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Issue Date: 24 January 2003

IN THE MATTER OF:
Tod N. Rockefeller
Complainant,

CASE NO.: 2002-CAA-0005

v.

United States Department of Energy
Respondents

RECOMMENDED ORDER

Recommended Summary Decision

Dismissal of Claim

Tod N. Rockefeller (herein "Rockefeller"), the Complainant, filed a whistleblower complaint against the Department of Energy ("DOE"), alleging violations of Section 322(a) (1-3) of the Clean Air Act, (CAA) 42 U.S.C 7622; Section 7001(a) of the Solid Waste Disposal Act, (SWDA) 42 U.S.C 6971; Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA) 42 U.S.C 9610; and Section 211 of the Energy Reorganization Act of 1974, as amended, (ERA) 42 U.S.C 5851. The Complainant is represented by Edward A. Slavin, Esquire, St. Augustine, Florida, and the Respondent by Elizabeth Rose, Esquire, Acting Chief Counsel, Department of Energy, Carlsbad Field Office, Carlsbad, New Mexico. This claim was initially filed *pro se* by the Complainant. Mr. Slavin, after entering his appearance, moved for remand. After the Respondent did not object, I entered an Order of Remand on February 7, 2002. However, the Complainant, without counsel, filed an appeal of the remand to the Administrative Review Board (ARB), which entered an Order to Show cause to the Complainant. On February 25, 2002, Rockefeller, responding to the show cause order, agreed that the Board should dismiss the petition for review and remand the case to me for further adjudication, which it did on February 28, 2002. See ARB Case No. 02-051

This is the sixth in a series of cases filed by the Complainant for whistleblower relief. The allegations made in cases one to five were determined to be the same and after reviewing the facts, the newer claims were considered to be barred by collateral estoppel. See Case No. 1999-CAA-0004, March 10, 1999. The Administrative Review Board has issued a final decision in the first four Rockefeller cases on October 31, 2000, dismissing them. ***Rockefeller v. U.S. Dep't of Energy***, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, appeal docketed, No.00-9545 (10th Cir. Dec. 28, 2000). The final case was dismissed on other grounds on May 30, 2001; ARB No. 00-039, ALJ No. 1999-CAA-21 ***Rockfeller v. Carlsbad Area Office, U.S. Dept. of Energy***. These were appealed by Rockefeller to the Tenth Circuit (10th Cir. Nos. 00-9545, 01-9529) and were subsequently dismissed on November 20, 2001 for lack of prosecution pursuant to 10th Cir. R. 42.1.

After a full review of the record before me, I find that even if the Complainant can prove that he has been the subject of retaliation, given the history of this claim, and given the current allegations, he is precluded from raising his former employment at the Department of Energy as the basis for protected activity under the whistleblower acts.

At the time that the case was initially before me the Complainant filed a Motion for Partial Summary Judgment and Respondent had filed a competing Motion for Summary Judgment. Both were denied as I found that there were unresolved material facts at issue.

Mr. Slavin argued that Rockefeller was *pro se* when he drafted the complaint and that I should have read in matters consistent with Rockefeller's theory of the case, as expressed by the request for hearing, filed after Counsel was obtained. In his request for hearing, Mr. Slavin addressed blacklisting, although that word does not appear in Rockefeller's complaint. *Pro se* pleadings are to be construed liberally, ***Hasan v. Sargent and Lundy***, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001).[1]

Subsequently, the Respondent and OSHA furnished more complete information as to why the claim was not accepted by OSHA. In an attempt to speed the process, I permitted the Complainant to amend the Complaint, which he did. Subsequently, the Respondent filed an Answer, and a "Renewed" Motion for Summary Judgment. The document is dated December 13, 2002.[2]

On December 18, 2002, a Complainant's Motion to Reject DOE's Second Dismissal Motion, Renewed Motion to Disqualify DOE Def4ense Counsel and Motion to Reset Any Further Pre-hearing Exchange.

Respondent also argues that:

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[1] In ***Cowan v. Bechtel Construction, Inc***., 87-ERA-29 (Sec'y Mar. 24, 1995), the Secretary considered the fact that Complainant had filed three prior ERA complaints against the Respondent prior to a new action did not fully provide whether there had been protected activity, and a causal link. The Secretary noted that "Complainant's failure to allege this protected activity as a potential basis for the adverse action does not preclude the Secretary from considering such a claim where as here it had been implicitly raised and litigated." Citing ***Yellow Freight Sys., Inc. v. Martin***, 954 F.2d 353, 357-59 (6th Cir. 1992). In ***Bonanno v. Northeast Nuclear Energy Co.***, 92-ERA- 40 and 41 (Sec'y Aug. 25, 1993), where a Complainant was not represented, the Secretary did not hold Complainant to the same standards for pleadings as if he were represented by counsel.Although the Complainant did not raise certain issues, his lawyer did subsequently. Therefore, under 29 CFR §18.5(e), I ordered an amended complaint.

[2] Meanwhile, Complainant has alleged that Respondent's attorney, Elizabeth C. Rose, Esquire, is a key witness in his case. Also the allegation that DOE Counsel is personally involved is a new issue that obviously was not contemplated when the OSHA letter was sent. This issue also complicates proceeding to a heaing set for February 20, as counsel may/may not be able to participate.

The ABA Model Rule of Professional Conduct 3.7 ("Lawyer as Witness") provides:

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

None of the exceptions apply here if DOE counsel is called.

Counsel for Respondent has maintained that she will withdraw as counsel if the case goes to hearing, but as long as the claim is in the motion stage she may continue to participate. Complainant has foiled two motions requesting an order that she be removed as counsel.

- Complainant's Amended Complaint fails to state a claim upon which relief may be granted in that the Complainant failed to exhaust his administrative remedies before the 10th Circuit or failed to exercise his administrative remedies in a timely fashion by timely filing his initial Complaint before the DOL within its specified 30-day deadline (see 29 CFR 24.3(b)).
- To the extent that the allegations set forth in the Amended Complaint were not the subjects of a formal administrative complaint of whistleblowing, especially with regards to OSHA, the Amended Complaint fails to set forth a claim upon which relief may be granted.
- The doctrine of res judicata should be applied in this case as Complainant failed to pursue his appeal to the 10th Circuit pursuant to FRCP 41(b), thus, the decisions of the DOL's ARB (ARB Case Nos. 99-002, 99-067, 99-068 and 99-063, Oct. 31. 2000 and ARB Case No. 00-039, May 30, 2001) (Exhibits 2 & 3) stand as final and operate as an adjudication on the merits.
- In two previous decisions by the MSPB and the Office of Special Counsel, Complainant was found not to have engaged in protected whistleblowing activity. Respondent asserts that, in the alternative, this honorable judge should accept these rulings and dismiss this Complainant's Amended Complaint for lack of standing as a whistleblower. See ***McKinney v. Tennessee Valley Authority,*** 92-ERS-22 (OALJ, March 17, 1992)(ALJ afforded res judicata effect to findings of MSPB Decision).

Subsequently, Complainant filed a "Sworn" Response to Respondents' "Renewed Motion for Summary Judgment," his Motion to Strike Insufficient Defenses to Amended Complaint and his Motion for Partial Summary Judgment.

Affirmative Defenses

1. *Timeliness.*

A. Complaint

The record shows that Mr. Rockefeller claims to have filed his complaint on or about July 20, 2001 (See notarial on face of Complaint). The record shows that the activity that Mr. Rockefeller now claims is actionable began June 11, 2001 (See paragraphs 13, 15, 16). He alleges another action occurred on June 13, but alleges that he did not learn of it until July 3 (Paragraphs 23 and 24). I note that in the original complaint, the Complainant alleges that he was assaulted by an unknown assailant on June 22, 2001, but I also note that this allegation is not part of the allegations set forth in the Amended Complaint.

I also note that the Complainant listed the Energy Reorganization Act ("ERA") as a basis for jurisdiction, Energy Reorganization Act, 42 U.S.C. § 5851. The others noted:

- Clean Air Act ("CAA"), 42 U.S.C. § 7622(b) within thirty days.
- Solid Waste Disposal Act ("SWD"), 42 U.S.C. § 6971(b) within thirty days.
- Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CECLA"), 42 U.S.C. § 9610 (b), within thirty days.

The Energy Policy Act of 1992, Pub. L. No. 102-486, amended the whistleblower provisions of the ERA, inter alia, to extend the limitations period for filing a whistleblower complaint to 180 days. 42 U.S.C. § 5851(b)(1) .

A review of this issue shows that it was first raised as an affirmative defense as a response to the Amended Complaint. At the time that the initial complaint was filed, the averment was that

the latest adverse activity occurred June 22, 2001, and the Complaint was filed within thirty days of that date.

The Amended Complaint avers that the Complainant discovered the latest alleged infraction on July 3, which is less than thirty days before filing of the initial complaint. Moreover, filing is not purely a jurisdictional issue and is subject to allegations of equitable tolling. Filing periods may, under certain specific circumstances, be tolled, such as where the complainant has in some extraordinary way been prevented from asserting his or her rights, or where the complainant raised the specific statutory claim but in the wrong forum. In ***Shelton v. Oak Ridge National Laboratory***, 95-CAA-19 (ALJ Apr. 21, 1998), Complainant moved for reconsideration of an order denying Complainant's motion for default judgment based on Respondents' failure to file a timely request for hearing with the OALJ. Complainant argued that the time period for requesting a hearing stated at 29 C.F.R. § 24.4(3)(i) is jurisdictional, citing ***Crosier v. Westinghouse Hanford Co.***, 92-CAA-3 (Sec'y Jan. 12, 1994) and ***Backen v. Entergy Operations***, 95-ERA-46 (ARB June 7, 1996). The ALJ denied the motion, finding that the unambiguous holding in both ***Crosier*** and ***Backen***, was not that the five day time period for filing a request for a hearing is jurisdictional, but that equitable grounds for modification of the time deadline had not been established. The ALJ also noted that in ***Ward v. Bechtel Const., Inc***., 85-ERA-9 (Sec'y July 11, 1986), the Secretary had indicated that an untimely request for a hearing may be excused on grounds of mistake, inadvertence, or excusable neglect.

Therefore, I accept that the allegation that the complaint was untimely is not well taken.

B. Request for hearing.

The record also shows that OSHA advised the Complainant that it had rejected his claim by letter dated November 8, 2002. It also told the Claimant that he had five (5) business days to file a request for hearing by FAX, overnight delivery or telegram. A copy of the docket sheet shows that Mr. Rockefeller filed his complaint with this office on November 15, 2001. Administrative Notice is taken that November 8 and November 15 both fell on a Thursday, so that carry over rules involving the end of the week are not relevant. The filing period begins with the date of the complainant's actual receipt of an OSHA determination letter, ***Staskelunas v. Northeast Utilities Co.***, 98-ERA-8 @ n.5 (ARB May 4, 1998). In reviewing the dates involved, I note that Respondent has not asserted that the date of the receipt was less than five (5) business days prior to November 15, the date of filing. Therefore, it is reasonable that the Complainant followed the letter of the law in filing his response to the OSHA letter in this case.

C. Appeal to the 10th Circuit Court of Appeals

Although Respondent makes the argument that the Claimant was not timely in filing his appeal, as this matter is before me, and the matter came on remand, I have proper jurisdiction and I reject the argument.

2. *Res Judicata*

The Respondent argues that the doctrine of res judicata should be applied in this case as the decisions of the DOL's ARB (ARB Case Nos. 99-002, 99-067, 99-068 and 99-063, Oct. 31. 2000 and ARB Case No. 00-039, May 30, 2001) stand as final and operate as an adjudication on the merits.

As a result, the Respondent is correct that absent special circumstances, the allegations set forth that relate to the prior cases must not be considered. The Complainant filed affidavits that purport to show that there are material facts outstanding on this issue. The Amended Complaint

attempts to incorporate the five other whistleblower claims that preceded this action. However, the parties agree that there are no disputed salient facts on this issue at this time.[3]

Mr. Rockefeller argues that *res judicata* does not govern this case under any theory, as Mr. Rockefeller's complaint focuses on the events of June-July, 2001.[4]

I agree with the Respondent that any matter which was considered in the five (5) whistleblower cases set forth above is administratively final and can not be raised in this proceeding absent exceptional circumstances, and that exceptional circumstances have not been shown. The ARB has issued a final decision in the five previous Rockefeller cases.[5]

"Issue preclusion" generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. ***New Hampshire v. Maine***, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968, (2001). Under issue preclusion principles, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." ***Robinson v. Volkswagenwerk AG***, 56 F.3d 1268, 1272 (10th Cir.1995) (citing ***Allen v. McCurry***, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). "Under the doctrine of collateral estoppel, ... the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979). Four requirements must be met before a finding in a previous action is conclusive in the instant action: (1) the issue must be identical to that involved in the prior proceeding; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. See ***Farmland Indus. Inc. v. Morrison-Quirk Grain Corp***., 987 F.2d 1335, 1339 (8th Cir.1993).

The law of the case doctrine "is a prudential principle that 'precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided.'" ***Field v. Mans,*** 157 F. 3d 35, 40 (1st Cir. 1998)(quoting ***Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.***, 41 F.3d 764, 770 (1st Cir. 1994)). The aspect of law of the case which applies in this circumstance, referred to as the "mandate rule," "instructs an inferior court to comply with the instructions of a superior court on remand." ***Field v. Mans***, *supra*, 157 F.3d at 40. See ***Law v. Medco Research, Inc***., 113 F.3d 781, 783 (7th Cir. 1997) (doctrine requires lower adjudicatory body to conform further proceedings in case to principles set forth in appellate opinion unless there is compelling reason to depart). The doctrine applies within administrative agencies as well. When this Board has ruled on a question of law, the law of the case doctrine binds an administrative law judge acting after a remand of the case. See, e.g., ***Ruud v. Westinghouse Hanford Co.***, No. 1988-ERA-33, ALJ RD&O on Remand, Dec. 8, 1988, at 5.

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[3] Complainant asks me to render Partial Summary Judgment on this issue characterizing it as an employer/employee issue, See Complainant's Response to Doe Motion to Dismiss and Renewed Motion for Partial Summary Judgment.

[4] On the other hand, it is interesting that the Complainant requests that I take judicial notice of the contents of his earlier cases with multiple filings. Brief dated January 21, 2003, at p. 1.

[5]. ***Rockefeller v. U.S. Dep't of Energy***, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, appeal docketed, No.00-9545 (10th Cir. Dec. 28, 2000); ***Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*** ALJ CASE NOS. 99-CAA-21, 99-CAA-22 (ARB May 30, 2001).

Respondent confuses *res judicata* (also known as "claim preclusion") with collateral estoppel (also known as "issue preclusion"). See ***Matosantos Commercial Corp. v. Applebee's Intern., Inc***., 245 F.3d 1203 (10th Cir.2001). 18 Charles Alan Wright et al., Federal Practice and Procedure § 4436 (1981); see also ***Okoro v. Bohman***, 164 F.3d 1059, 1063 (7th Cir.1999) ("[A] jurisdictional dismissal precludes only the relitigation of the ground of that dismissal, and thus has collateral estoppel (issue preclusion) effect rather than the broader res judicata effect." (citations omitted)); ***GAF Corp. v. United States***, 818 F.2d 901, 912 (D.C.Cir.1987) (explaining that, despite Rule 41(b), a judgment dismissing an action for lack of jurisdiction will "have preclusive effect as to matters actually adjudicated" and will "preclude relitigation of the precise issue of jurisdiction that led to the initial dismissal"); Restatement (Second) of Judgments § 20 cmt. b (1980).[6] When a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of an issue "in substance the same" as that resolved in an earlier proceeding. See ***Kidwell v. Army***, 56 F.3d 279, 286-87 (D.C.Cir.1995)

For reasons more fully set forth below, I accept that Rockefeller is now barred by the doctrine of issue preclusion and the law of this case enunciated by the ARB from re-litigating whether he was a "whistleblower" in the previous cases. See ***Sawyers v. Baldwin Union Free School District***, No. 85-TSC-00001, slip op. at 18 (Sec'y Oct. 24, 1994); ***Agosto v. Consolidated Edison Co.***, ARB Nos. 98-007, 98-152, ALJ Nos. 96-ERA-2, 97-ERA-5, slip op. at 6 (ARB July 27, 1999).

I agree that the Complainant has pled a new cause of action relating to the events of June and July, 2001. However, I can not accept that he has a viable whistleblower act claim.

Respondent directs me to two decisions by the MSPB and the Office of Special Counsel, where Complainant was found *not* to have engaged in protected whistleblowing activity. I am asked to give these *res judicata* effect. Respondent asserts that, in the alternative, I should accept these rulings and dismiss this Complainant's Amended Complaint for lack of standing as a whistleblower. See ***McKinney v. Tennessee Valley Authority,*** 92-ERS-22 (OALJ, March 17, 1992)(ALJ afforded res judicata effect to findings of MSPB decision). The ARB reviewed the fact pattern alleged by the Complainant and independently determined that the Complainant did not raise colorable whistleblower claims until he had been fired by the Respondent in 1997.

3. Failure to state a claim for relief.

Respondent argues that since the allegations set forth in the Amended Complaint were not the subjects of a formal administrative complaint of whistleblowing, investigated by OSHA, the Amended Complaint fails to set forth a claim upon which relief may be granted.

I do not accept that this is a valid reason, but I do accept that Respondent is correct for another reason. The Complainant must make a prima facie case, and must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. ***Trimmer v. U.S. Dept. of Labor***, 174 F.3d 1098, 1101 (10th Cir. 1999).).See § 5851(b)(3)(C); see also ***Dysert v. Secretary of Labor***, 105 F.3d

[6] It has been noted that the phrase "on the merits" is "an unfortunate phrase, which could easily distract attention from the fundamental characteristics that entitle a judgment to greater or lesser preclusive effect." 18 Charles Alan Wright et al., Federal Practice and Procedure § 4435 (1981); see also ***Semtek Int'l Inc. v. Lockheed Martin Corp***., 531 U.S. 497, 121 S.Ct. 1021, 1025, 149 L.Ed.2d 32 (2001) (noting the confusion associated with the phrase).

607, 609-10 (11th Cir. 1997) [7] I must act as a "gatekeeper" to determine whether, under the whistleblower acts, a complainant must establish a prima facie case that protected behavior contributed to an unfavorable personnel action before the Secretary may even investigate the complaint. In a similar case, the Court concluded that this requirement, unique to ERA, serves as a "gatekeeping function" and therefore operates as a pleading requirement as well as an evidentiary standard. ***Hasan v. United States Dep't of Labor***, 298 F.3d 914 (10th Cir.,2002), *cert. denied* January 21, 2003 (U.S., No. 02-592).

Gatekeeping

Whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." ***Passaic Valley Sewerage Comm'rs v. Department of Labor***, 992 F.2d 474, 478 (3d Cir. 1993). A blacklist is defined as a list of persons or organizations that have incurred disapproval or suspicion or are to be boycotted or otherwise penalized.[8] Therefore, blacklisting is a form of reprisal.[9] "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." ***Black's Law Dictionary***, 154 (5th Ed. 1979). "Blacklisting is the quintessential discrimination, i.e., distinguishing in the treatment of employees by marking them for avoidance." ***Leveille v. New York Air National Guard***, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995). Blacklisting is "insidious and invidious [and] cannot easily be discerned." ***Egenrieder v. Metropolitan Edison Co./G.P.U.***, 85-ERA-23 (Sec'y Apr. 20, 1987). Blacklisting violates whistleblower laws regardless of the recipient of the information. See ***Earwood v. Dart Container Corp.***, 93-STA-16 (Sec'y Dec. 7, 1994) and ***Gaballa v. The Atlantic Group, Inc***., 94-ERA-9 (Sec'y Jan. 18, 1996)(reference checking company). Under the Clean Air Act[10], the following is set forth, as pertinent:

(a) Discharge or discrimination prohibited:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

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[7] Note that the ARB has taken the position that a complainant only is required to present evidence sufficient to raise an inference of discriminatory motivation to establish a prima facie case. ***Adornetto v. Perry Nuclear Power Plant***, 1997-ERA-16 (ARB Mar. 31, 1999).

[8] http://www.dictionary.com/cgi-bin/dict.pl?term=blacklisting.

[9] Whistleblower provisions do not protect workers from unreasonable or arbitrary actions on the part of an employer -- rather, they only protect workers from actions taken in retaliation for engaging in activities protected by the ERA. ***Collins v. Florida Power Corp***., 91-ERA-47 and 49 (Sec'y May 15, 1995). Whistleblowing is not directly concerned with safety standards, only the deviation from or the flouting of them. ***Norris v. Lumbermen's Mut. Casualty Co.***, 881 F2d 1144 (1st Cir. 1989). The federal "whistleblower" statutes promote enforcement of environmental laws by protecting employees who aid a government enforcement agency. ***Willy v. Coastal Corp***., 855 F.2d 1160 (5th Cir. 1988).

[10] 42 U.S.C.A. § 7622 United States Code Annotated Title 42. The Public Health and Welfare Chapter 85--air Pollution Prevention and Control Subchapter Iii--general Provisions § 7622. Employee protection.

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
(2) testified or is about to testify in any such proceeding, or
(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

(b) Complaint charging unlawful discharge or discrimination; investigation; order

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.
(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(g) Deliberate violation by employee. Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.

The implementing regulations state in part pertinent:

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, *blacklists*, discharges, or in any other manner discriminates against any employee because the employee has:

> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
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> (2) Testified or is about to testify in any such proceeding; or
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> (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

(Emphasis added). 29 CFR §24.2(b). Note that there are similar provisions in the other acts involved in this case.

Similarly, the Energy Reorganization Act prohibits employers from discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. § 5851(a). Congress amended § 5851 of the Act in 1992 to include a gatekeeping function which prohibits the Secretary from investigating a complaint unless the complainant establishes a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint.

Under the ERA, although Congress desired to make it easier for whistleblowers to prevail in their discrimination suits, it was also concerned with stemming frivolous complaints. Consequently, the statute contains a gatekeeping function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a prima facie case that his protected behavior was a contributing factor in the employment action alleged in the complaint. See Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123-24 (amending 42 U.S.C. § 5851(b)).[11]

To make a prima facie case of retaliation under Civil Rights Act of 1964, an employee must show that employee was engaged in protected activity, that employer was aware of that activity, that employee suffered adverse employment decision, and that there was causal connection between protected activity and adverse employment action. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A.§ 2000e-3(a). The Tenth Circuit applies the approach to Title VII retaliation claims the factors established in ***McDonnell Douglas***. See ***Burrus v. United Telephone Co.***, 683 F.2d 339 (10th Cir.), cert. denied, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982) . In ***Burrus*** the Court held that the elements of a prima facie case of retaliation are: (1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's action. Id. at 343. Generally the same logic is applied to whistleblowing cases as is used under Title VII.

To constitute protected activity under the environmental whistleblower statutes, an employee's acts must implicate safety definitively and specifically. ***American Nuclear Resources v. U.S. Department of Labor***, 134 F.3d 1292 (6th Cir. 1998). The environmental protection statutes do not protect every incidental or superficial suggestion that somehow, in some way,

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[11] See § 5851. The amendment to § 5851 became effective as to claims filed with the Secretary on or after October 24, 1992. See Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(i), 106 Stat. 2776, 3125. Accordingly, courts which have used the McDonnell Douglas burden-shifting framework to adjudicate ERA claims did so because the complaints were filed prior to that date. See, e.g., ***Kahn v. Secretary of Labor***, 64 F.3d 271, 276 & n. 4, 277-78 (7th Cir.1995); ***Bechtel Constr. Co. v. Secretary of Labor***, 50 F.3d 926, 930, 934 (11th Cir.1995); see also ***Stone & Webster Eng'g Corp. v. Herman,*** 115 F.3d 1568, 1572 (11th Cir.1997) (rejecting the ***McDonnell Douglas*** burden-shifting framework in favor of amended § 5851's burden-shifting requirements).

may possibly implicate a safety concern. ***Stone & Webster Engineering Corp. v. Herman***, 115 F.3d 1568, 1574 (11th Cir. 1997).[12] Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity. ***Bechtel Construction Co. v. Secy. of Labor***, 50 F.3d 926, 931 (11th Cir.1995). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. Id. Where the Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. See ***Nathaniel v. Westinghouse Hanford Co.***, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9. [13]

Activity is protected even when it is based on a mistaken good faith belief that the law has been violated. ***Love v. Re/Max of America, Inc***., 738 F.2d 383 (10th Cir. (Colo.) 1984). See, also e.g., ***Rucker v. Higher Educational Aids Board***, 669 F.2d 1179, 1182 (7th Cir.1982); ***Sisco v. J.S. Alberici Construction Co.***, 655 F.2d 146, 150 (8th Cir.1981), cert. denied, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982); ***Payne v. McLemore's Wholesale & Retail Stores***, 654 F.2d 1130, 1137-40 (5th Cir.1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); ***Parker v. Baltimore & Ohio Railroad Co.***, 652 F.2d 1012, 1019 (D.C.Cir.1981); ***Monteiro v. Poole Silver Co.***, 615 F.2d 4, 8 (1st Cir.1980); ***Sias v. City Demonstration Agency***, 588 F.2d 692, 695 (9th Cir.1978); see also ***Mitchell v. Visser***, 529 F.Supp. 1034, 1043 (D.Kan.1981). However, in this case, the ARB has determined that previous claims did not invoke whistleblowing protection. Principles of issue preclusion prevent re-litigation of those issues.

The Complainant relies on the mere fact that he had filed claims alleging whistleblowing to assume that he has status as a whistleblower. However, the facts relative to his employment were reviewed in the five prior cases and he was found not to have been a whistleblower at that

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[12] However, an employee's complaints about occupational safety and health generally are not protected by environmental whistleblower laws: "Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in United States Federal District Courts, not within the Department of Labor's administrative adjudicatory process." ***M.C. Tucker v. Morrison and Knudson***, 94- CER-1 at 5 (ARB Feb. 28, 1997); see also ***Minard v. Nerco Delamar Co.***, 92- SWD-1 (Sec'y Jan. 25, 1995) slip op. at 8; ***Aurich v. Consolidated Edison Co. of New York, Inc***., 86-CAA-2 (Sec'y Apr. 23, 1987) slip op. at 3-4. As the ARB has said, "[t]he distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one." M.C. Tucker at 5. An employee who complains of occupational safety and health concerns will not receive environmental whistleblower protection unless his claims implicate environmental law as well by "touch[ing] upon" public safety and health. See ***Sawyers v. Baldwin Union Free School District***, 85- TSC-1, note 12 (Sec'y Oct. 24, 1994), (citing ***Aurich*** slip op. at 4); ***Scerbo v. Consolidated Edison Co. of New York, Inc***., 89-CAA-2, p. 4 (Sec'y Nov. 13, 1992).

[13] The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of the applicable environmental statutes. ***Goldstein v. Ebasco Constructors Inc***., Case No. 86-ERA-36 (Sec'y Dec. and Order April 7, 1992), rev'd sub. nom,. ***Ebasco Contractors, Inc. v. Martin***, No. 92-4576 (5th Cir. Feb. 16, 1993) (per curiam); ***Willy v. The Coastal Corporation***, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987); ***Mackowiak v. University Nuclear Systems,*** Inc., Case No. 82-ERA-8 (Sec'y Dec. and Order April 29, 1983). Reporting safety and environmental concerns under CERCLA internally to one's employer is protected activity. ***Dodd v. Polysar Latex***, 88-SWD-4 (Sec'y Sept. 22, 1994); see also ***Helmstetter v. Pacific Gas & Electric Co.***, 91-TSC-1 (Sec'y Jan. 13, 1993)(addressing internal complaints under TSC complaint); ***Hermanson v. Morrison Knudsen Corp***., 94-CER-2 (ARB June 28, 1996)(addressing internal complaints under CERCLA).

time. As gatekeeper, if the Complainant fails to show entitlement at a preliminary stage as to any reqired element, the claim should be dismissed. ***Hasan***, *supra*.

Claim History

A review of the case history shows that the Complainant worked as a GS-13 Environmental Specialist for the Department of Energy Carlsbad Area Office from April 1993 to December 1997. In April, 1996 he gave a report to his supervisor in which he found a contractor's (Westinghouse's) draft comment resolutions to a "safety analysis report for packing" for a remote handled shipping cask to be unacceptable. When after two days his superior had not acted on his report, Rockefeller forwarded the report to other DOE officials and to Westinghouse at the site where Rockefeller worked.

Rockefeller later received a failing performance appraisal for the period from August 1996 to July 1997 and was given a Notice of Proposal to Remove him from the federal service on September 2, 1997. On December 9, 1997, Rockefeller was given a Notice of Decision to Remove him from the federal service effective December 10, 1997, and on that date he was terminated from emoloyment.

Five months post termination, on May 9, 1998, Complainant, through counsel, filed his first complaint, 98-CAA-10 and 11, with the Occupational Safety and Health Administration (OSHA) alleging retaliation under the Surface Transportation Assistance Act (STAA) and the Clean Air Act (CAA). I note that Complainant has brought this case under the auspices of the CAA, but also alleges that it is brought under the SWD, CECLA and ERA.

When DOE proposed to remove Rockefeller from his position on September 2, 1997, he filed a complaint with the Office of Special Counsel ("OSC")[14] alleging that (as characterized by the OSC) CAO management had discriminated against him on the basis of his physical and mental disabilities; had violated 5 C.F.R. §430 (providing for performance appraisals); had failed to issue him a determination concerning material he had requested under the Freedom of information Act (FOIA); and had retaliated against him for whistleblowing and for filing EEO complaints. Rockefeller (as restated by OSC) asserted that in retaliation for "blowing the whistle on DOE management's wrongdoing in April 1996," DOE gave Rockefeller a failing performance evaluation, failed to select him for promotion, denied him training, and proposed his removal in September 1997. OSC denied Rockefeller's complaint. Of particular relevance to this case, OSC rejected his claim under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), because it found he had not engaged in activity protected by that statute.[15]

After the OSC denied his complaint, Rockefeller filed an Individual Right of Appeal of DOE's proposal to remove him with the Merit Systems Protection Board (MSPB), making the same claim of reprisal for whistleblowing that he had raised with the OSC, as well as EEO,

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[14] The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency whose authority is derived from the Civil Service Reform Act, 5 U.S.C. §1101 et seq.(1994); the Whistleblower Protection Act, 5 U.S.C. §2302(b) (1994); and the Hatch Act, 5 U.S.C. §7323 (1994).

[15] The Whistleblower Protection Act prohibits the taking of a personnel action because of

> any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences--(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . .

.5 U.S.C. §2302(b)(8) (1994).

disability discrimination, and other claims. An MSPB Administrative Judge found that Rockefeller had not engaged in whistleblowing protected under the Whistleblower Protection Act and dismissed his appeal. ***Rockefeller v. Department of Energy***, MSPB Docket Number DE-1221-98- 0003-W-1, Initial Decision, Nov. 3, 1997, slip op. at 3.

Rockefeller also appealed his termination to the MSPB. The same administrative judge found again that Rockefeller had not engaged in protected activity under the Whistleblower Protection Act and affirmed DOE's action to remove him. ***Rockefeller v. Department of Energy***, MSPB Docket Number DE-0752-98-0138-I-1, Initial Decision, April 6, 1998, slip op. at 4.

Rockefeller appealed both Initial Decisions of the administrative judge to the MSPB, but then moved on June 8, 1998, to dismiss those appeals without prejudice on the asserted ground that he needed to do so in order to pursue the first of the DOL complaints at issue here. The MSPB granted Rockefeller's motion and gave him until December 15, 1998, to refile his complaint. ***Rockefeller v. Department of Energy***, MSPB Docket Numbers DE-1221-98-0003-W-1 and DE-0752-98-0138-I-1, Order, Nov. 13, 1998. When Rockefeller failed to refile until January 25, 1999, the MSPB dismissed his appeals as untimely. Id., Opinion and Order, April 28, 1999.

Meanwhile, Rockefeller filed his first complaint of discrimination under the STAA and the CAA with the Department of Labor on May 9, 1998. Rockefeller named as respondents both DOE and Westinghouse. In ***Rockefeller v. Department of Energy*** (Rockefeller I), 98-CAA-10 and 11, Rockefeller alleged that after he raised safety concerns in his internal report and sent that report to DOE management and Westinghouse, DOE retaliated against him by giving him poor performance evaluations and then terminating him. Rockefeller asserted that his report was protected activity under the employee protection provisions of the STAA and the CAA. Respondents filed motions to dismiss, and on September 28, 1998, Judge Henry Lasky issued a Recommended Decision and Order (Rockefeller I RD&O) recommending that those motions be granted. Judge Lasky ruled that Rockefeller was not a covered employee, and DOE was not a covered employer under the STAA, and that Rockefeller's CAA complaint was untimely filed because it was filed more than 30 days after Rockefeller's termination. Judge Lasky rejected Rockefeller's contention that the CAA's limitations period was equitably tolled because Rockefeller had filed his environmental complaint timely but in the wrong forum.

On October 2, 1998, Rockefeller filed a complaint in ***Rockefeller v. Department of Energy*** (Rockefeller II), 99-CAA-1. He repeated his allegations from Rockefeller I and alleged that:

> 1. DOE and Westinghouse wrongfully induced the ALJ to recommend dismissal of Rockefeller I.
>
> 2. The Recommended Decision and Order in Rockefeller I was contaminated by ex parte contacts between Respondents, OSHA, and the ALJ.
>
> 3. A DOE lawyer had an improper motive and gave improper legal advice to DOE's Albuquerque Regional Office personnel about Rockefeller's FOIA request, which resulted in DOE denying Rockefeller's fee waiver request and attempting to charge him $28,000 for 1200 hours of search time under FOIA.
>
> 4. DOE's $28,000 search charge was an act of discrimination to impede and delay Rockefeller's ability to obtain evidence of environmental violations.
>
> 5. Respondents' actions were an obstruction of Rockefeller's whistleblower rights and a continuing violation under the STAA and CAA.

Judge Edward C. Burch, to whom ***Rockefeller II*** was assigned, issued an Order to Show Cause why the complaint should not be dismissed. Following responses by all parties, on December 4, 1998, Judge Burch issued a Recommended Decision and Order of Dismissal with

Prejudice (Rockefeller II RD&O). The ALJ found that Rockefeller's response to the show cause order "contained no facts that would support the allegations of improper ex parte contacts and undue influence . . ."; and the fact "[t]hat one of the respondents wished to charge a copying fee in the first action fails to state a cause of action under the Clean Air Act." ***Rockefeller II*** RD&O slip op. at 3.

On November 2, 1998, Rockefeller filed his third complaint, which also concerned DOE's treatment of Rockefeller's FOIA request. ***Rockefeller v. Department of Energy*** (Rockefeller III), 99-CAA-4. Rockefeller had appealed DOE's denial of the fee waiver request to the DOE Office of Hearings and Appeals, which denied the appeal because it found that the requested material would not contribute to the general public's understanding of the subject of the materials. DOE Office of Hearings and Appeals Decision and Order (DOE D&O), Oct. 28, 1998, slip op. at 3-4. In ***Rockefeller III***, Rockefeller repeated his allegations from Rockefeller I and II, and alleged that DOE's reference to Rockefeller's counsel as a "commercial requester" for purposes of a FOIA fee waiver request was improper and contrary to law. Rockefeller also alleged that a DOE lawyer had been motivated by retaliatory animus to give improper legal advice to DOE about the FOIA request which caused DOE to assess Rockefeller $28,000. ***Rockefeller III***, slip op. at 4.

Judge Burch issued an order to show cause why ***Rockefeller III*** should not be dismissed; following responses by the parties, on March 10, 1999, the ALJ issued a Recommended Decision and Order dismissing the case with prejudice. ***Rockefeller III*** RD&O. The ALJ ruled that the Rockefeller III complaint did not state a new cause of action and was barred by operation of collateral estoppel. In addition, Judge Burch ruled that the complaint "fails to prove the essential elements of a violation of the employee protection provision of the STAA or the CAA." ***Rockefeller III*** RD&O, slip op. at 8.

In ***Rockefeller v. Department of Energy*** (Rockefeller IV), ALJ Case No. 99-CAA-6, Complainant repeated the allegations of ***Rockefeller I, II, and III***, alleging that: (1) he was improperly served with the motions to dismiss in Rockefeller II because the motions were filed with the ALJ by Federal Express, but were served on Rockefeller by regular mail; and (2) the ALJ improperly granted Respondents' motions to dismiss before the time had elapsed for the filing of Rockefeller's response to the motions. Judge Burch found the only new allegations "patently absurd" and on February 19, 1999, issued a Decision and Order Recommending Dismissal with Prejudice (***Rockefeller IV*** RD&O).

The ARB determined that none of these cases have merit. It noted that the federal government and its employees are excluded from the STAA's scope. Moreover, it found "Rockefeller's CAA claim of unlawful termination was not filed within the CAA's 30-day limitations period and is not subject to equitable tolling. And the allegations in Rockefeller II, III, and IV to the extent that they are not mere repetitions of claims made in Rockefeller I--do not state claims under the CAA and are spurious."

The Appeal of these cases to the Tenth Circuit Court of Appeals was dismissed (Cases 00-9545 and 01-9529).

In ***Rockefeller I,*** Complainant argued that the claim was timely filed but was pled in the "wrong forum." He claims he made a complaint of retaliation on January 5, 1998, "to the EPA WIPP group in Washington, D.C." May 9, 1998 complaint, ¶ 12. In addition, he asserts that his complaint to the MSPB tolled the CAA limitations period. However, the MSPB record shows that the Complainant did not file a viable whistleblower claim at the MSPB. In the November 8, 1997 Initial Decision dismissing Rockefeller's appeal, the Administrative Judge characterized Rockefeller's whistleblower claim as follows:

> [Rockefeller] stated that he issued an April 18, 1996 report in which he found Westinghouse's draft comment resolutions to a "safety analysis report for packing"

(SARP) for a remote handled shipping cask to be unacceptable. Specifically, he reported that Westinghouse's draft resolutions failed to resolve certain concerns with the SARP. He submitted the report to his team leader in the Department of Energy's (DOE's) Carlsbad Area Office (CAO), Don Watkins. But perceiving that Watkins would not issue the report, he independently submitted it to CAO management and to Westinghouse. The appellant claims that by his independent release of the report, he blew the whistle on CAO management's failure to follow DOE Order Number 5480.3, paragraph 6.c(2), which states that "heads of Field Organizations . . . perform an independent and objective review and evaluation of contractors' safety analysis reports for packaging designs."

Rockefeller v. Department of Energy, MSPB Docket Number DE-1221-98-0003-W-1, Initial Decision, Nov. 3, 1997, slip op. at 3. The ARB specifically found that Rockefeller never articulated a CAA whistleblower claim to the MSPB.

Rockefeller V(ALJ Case Nos. 99-CAA-21and 99-CAA-22) asserted the same allegations, plus destruction of evidence, laches, timeliness, conflict of interest, and collateral estoppel. Judge Burch held that collateral estoppel applied to all the claims from the first four Rockefeller cases realleged in this complaint, since those claims had all been dismissed by ALJs. The ARB determined as to the merits of the claim, that Rockefeller is now barred by the doctrine of issue preclusion from relitigating the issues raised in the previous cases. See ***Sawyers v. Baldwin Union Free School District***, No. 85-TSC-00001, slip op. at 18 (Sec'y Oct. 24, 1994); ***Agosto v. Consolidated Edison Co.***, ARB Nos. 98-007, 98-152, ALJ Nos. 96-ERA-2, 97-ERA-5, slip op. at 6 (ARB July 27, 1999). As to destruction of evidence, the ARB decided that the FOIA request he had filed does not raise a cognizable claim of an adverse employment action. This Decision and Order was not appealed.

Therefore, in the five previous Department of Labor whistleblower cases, it was determined that Mr. Rockefeller failed to file the initial claim in a timely manner, as he had filed more than thirty (30) days post termination from his job. I also note that Claimant was no longer an “employee” of DOE when he filed initially.

Generally former employees are entitled to assert whistleblower claims, under application of a Title VII case, ***Robinson v. Shell Oil Co.,*** 519 U.S. 337 (1997). The Complainant’s case differs from Robinson in that whereas Robinson perfected his status, the Complainant did not file his initial whistleblower claim while he was a DOE employee or within the statutorily required filing period post termination. Although I had determined when I agreed to remand that Rockefeller, having filed and participated in the five prior whistleblower actions bearing his name, “commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a)” and is therefore a member of a class protected under 29 CFR §24.2, I did not have all of the prior decisions before me previously, and I am now advised that Complainant had been adjudicated as not having whistleblower status when he first brought any of the five (5) prior whistleblower claims before the Department of Labor.[16]

In ***Robinson***, after he was fired by respondent, petitioner filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964. While that charge was pending, Robinson applied for a job with another company, which contacted Shell Oil for an employment reference. Claiming that respondent gave him a negative reference in retaliation for his having filed the EEOC charge, petitioner filed suit under § 704(a) of Title VII, which makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have availed themselves of Title VII's protections. The District Court dismissed the action, and the en banc

[16] See statement of Counsel, Transcript of January 13, 2003 hearing, at p. 15.

Fourth Circuit affirmed, holding that the term "employees" in § 704(a) refers only to current employees and therefore petitioner's claim was not cognizable under Title VII. The Supreme Court found

> We hold that the term "employees," as used in § 704(a) of Title VII, is ambiguous as to whether it includes former employees. It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage. Accordingly, the decision of the Fourth Circuit is reversed

Id.

Robinson was a Title VII case, and Robinson is black. His status as a black person is immutable. The protected class in ***Robinson*** is black people. In ***Hasan***, the Court compared Title VII claims for relief with environmental whistleblower act claims. Although they are similar, they are not completely congruent. Hasan argued that the Court ignored pleading requirements articulated in ***Swierkiewicz v. Sorema N.A.***, 534 U.S. 506, 88 FEP Cases 1 (2002), a title VII case, and that he was not required to plead with specificity all the elements of his prima facie case. The Tenth Circuit rejected his claim, in part, because he failed to satisfy all three elements of an ERA prima facie case. Therefore, although the words "employee" may mean "former employee" in a whistleblower setting, in this case I must review the facts before I accept that any former employee is entitled to status as a whistleblower.

Generally, activity is protected even when it is based on a mistaken good faith belief that the law has been violated. ***Love v. Re/Max of America, Inc***., 738 F.2d 383 (10th Cir. (Colo.) 1984). See, also e.g., ***Rucker v. Higher Educational Aids Board***, 669 F.2d 1179, 1182 (7th Cir.1982); ***Sisco v. J.S. Alberici Construction Co.***, 655 F.2d 146, 150 (8th Cir.1981), cert. denied, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982); ***Payne v. McLemore's Wholesale & Retail Stores***, 654 F.2d 1130, 1137-40 (5th Cir.1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); ***Parker v. Baltimore & Ohio Railroad Co.***, 652 F.2d 1012, 1019 (D.C.Cir.1981); ***Monteiro v. Poole Silver Co.***, 615 F.2d 4, 8 (1st Cir.1980); ***Sias v. City Demonstration Agency***, 588 F.2d 692, 695 (9th Cir.1978).

However, in this case, the ARB on five (5) separate occasions prior to the filing of this case has determined that the Complainant did not have whistleblower status, and Complainant failed to assert this position on appeal before the 10th Circuit, as the case was dismissed without rendering a decision on this issue. Therefore it is final. As to the issue whether the filing of his claims grants Mr. Rockefeller "whistleblower" status, in four essential elements of collateral estoppel are:

1. The issue precluded must be the same one involved in the prior proceeding;
2. The issue must actually have been litigated in the prior proceeding;
3. Determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and
4. The prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue.

Mintzmyer v. Dep't of Interior, 84 F.3d 419, 423 (Fed.Cir.1996); ***Mercer v. Department of Health and Human Services***, 4 Fed.Appx. 888, 2001 WL 117763 (Fed.Cir 2001) The requirement of actual litigation can be satisfied when one party raises a dispositive issue of fact and an adverse party with opportunity and motive to challenge the issue fails to actually challenge it. See ***Harris Trust & Sav. Bank v. Ellis*** 810 F.2d 700, 705 (7th Cir.1987). ***N.L.R.B. v. Master Slack and/or Master Trousers Corp***., 773 F.2d at 881 (6th Cir. 1985) 773 F.2d at 881.

In ***Stephenson v. NASA***, ARB No. 98-025, ALJ No. 1994-TSC-5 (ARB July 18, 2000), the ARB found that the law of the case doctrine applies to adjudications within administrative agencies. Thus, when the ARB "has ruled on a question of law, the law of the case doctrine binds an administrative law judge acting after a remand of the case." However, the law of the case does not apply where there is intervening, controlling authority.

On January 13, 2003, I held a telephone hearing on the parties' opposing Motions for Summary Decision. At that time, I cited to ***Trimmer***, supra, and to ***Robinson v. Shell Oil***, regarding whether Mr. Rockefeller has the status of a whistleblower in this case or had engaged in protected activity.[17] I asked the parties to explain thir positions on "protected activity" (TR 13, 14). Both filed briefs.[18]

The status of "whistleblower" is not genetic. The protected class in whistleblower cases is derived from conduct and status as a whistleblower can change over time. In this case, the law of the case is that Complainant was not a protected whistleblower when he filed ***Rockerfeller*** I by determination of the ARB.

To establish a ***prima facie*** case of a violation of the CAA's employee protection provision, Mr. Rockefeller must show that he engaged in protected activity of which the respondent was aware and that the respondent took adverse action against him, and he must raise the inference that the protected activity was the likely reason for the respondent's adverse action against him. ***Trimmer,*** *supra****; Tyndall v. U.S. Environmental Protection Agency,*** 1993-CAA-6 (ARB, 1996); ***Jackson v. Comfort Inn, Downtown,*** 1993-CAA-7 (Sec'y, 1995). Timing may be a factor in determining whether a respondent's adverse actions were taken in retaliation for a complainant's protected activities. ***Tyndall,*** *supra*, ***citing Couty v. Dole,*** 886 F.2d 147, 148 (8th Cir. 1989). ***See also Simon v. Simmons Foods, Inc.,*** 49 F.3d 386, 389 (8th Cir. 1995). It follows that timing is also a factor in determining status.

In order to perfect a whistleblowing claim, one must relate the charge to safety and quality control activities is protected activity. ***McCuistion v. Tennessee Valley Auth***., 89-ERA-6 (Sec'y Nov. 13, 1991). ***Mc Cuiston*** is an ERA case, but the principle is the same in a CAA case. In ***Melendez v. Exxon Chemicals Americas***, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), the ARB held that

> In view of the role of protected activities in the retaliatory intent analysis, identification of the activities that were engaged in that are statutorily protected is a crucial first step. The chronology of protected activities and personnel actions is also important, as temporal proximity between protected activity and the decision to take an adverse action is relevant to the determination whether such action was motivated by retaliatory intent. ... Thus, as is hereinafter more fully discussed, the failure of the ALJ to first identify which of Melendez' activities qualified for protection makes it impossible to determine which of Exxon's actions taken against Melendez were taken for wholly legitimate reasons rather than in retaliation for Melendez having engaged in such activity.

Slip op. at 12 (citation omitted). A concurring opinion by the Chair of the ARB clarified that "[e]ven in cases in which the ALJ or this Board ultimately conclude that no unlawful

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[17] Transcript ("TR"), at 8-10. I note that the Transcript contains several errors, especially as to the spelling of Case names, calling "count" "account", etc; but this is not one of them.

[18] I note that Respondent did not address the issue and the response given, "Respondent recognizes that Complainant may have engaged in alleged protected activity in seeking information in support of of ongoing litigation..." is not responsive to the issue whether the Complainat has status as a "whistleblower" who is a former employee of DOE. I do not accept this as an acceptance that Complainant has status as a whistleblower.

discrimination took place, the preliminary step of evaluating the protected or non-protected status of the actions that prompted the complaint is procedurally useful, helping to focus the discrimination inquiry." Slip op. at 43-44. The concurrence, however, also observed in a footnote that "[o]f course, it generally would not be necessary to explore the 'protected activity' question in cases where no adverse action has occurred. However, it is undisputed in this case that Melendez suffered an adverse action, i.e., he was discharged." Slip op. at 44 n.55. See also ***Jayco v. Ohio Environmental Protection Agency***, 1999-CAA-5 (ALJ Oct. 2, 2000), the ALJ cited ***Van Beck v. Daniel Construction Co.***, 1986-ERA-26 (Sec'y Aug. 3, 1998) at 3(in order for jurisdiction to attach, a nexus must be established between the alleged protected activity and the objective or purpose of the Act).

Rockefeller's Position on Protected Activity

Rockefeller argues that as a former employee and litigant he is entitled to protected status as a matter of law.[19] His position is that:

> For six years, Mr. Rockefeller has raised pointed, valid concerns about WIPP[20]: DOE's hostile response has been to fire him and to blacklist him, banning him from worksites that DOE does not even own, including all WIPP contractor sites in Carlsbad, N.M. Mr. Rockefeller has persistently raised his concerns as an employee and since his firing. He is therefore protected against DOE's permanent blacklisting.

Brief,at p. 1 dated January 21, 2003. He argues that blacklisting is a continuing violation and as long as Mr. Rockefeller had been an employee of Respondent and as long as he had filed a claim alleging whistleblowing, blacklisting may be remedied.

> Here, Mr. Rockefeller is viewed as just such a threat. He was the first federal employee fired at the Waste Isolation Pilot Plant and remains a vocal, outspoken, articulate, indefatigable critic speaking, writing and litigating against DOE on issues relating to environmental, health and safety. The specter of some twenty suspected terrorists possessing hazardous waste truck licenses in the wake of September 11, 2001 makes Mr. Rockefeller's concerns about shipping casks for transuranic (TRU) radioactive wastes -- highly radioactive wastes with incredibly long half-lives -- very significant, and should give DOE pause in trying to beat him into the ground (and DOL in tolerating for one more minute DOE's flummery of six years).

January 21 Brief at p. 4.

The Amended Complaint alleges Mr. Rockefeller engaged in protected activity under environmental whistleblower laws, including litigation of his DOL whistleblower, False Claims Act and civil rights actions against Respondents (Paragraph 2). I will discuss the alleged status as a whistleblower based on prior filings below. The reference to the False Claims Act and to civil rights actions are plead, but are unexplained. Only activities enumerated in the statutes are

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[19] Citing to ***Charlton v. Paramus Board of Education***, 25 F.3d (3d Cir. 1994); ***Veprinsky v. Fluor Daniel, Inc***., 87 F.3d 881 (7th Cir. 1998); ***Bailey v. USX Corp***., 850 F.2d 1506 (11th Cir. 1998); ***Sherman v. Burke Contracting, Inc***., 891 F.2d 1527 (11th Cir.), cert. denied 498 U.S. 943 (1990); see also ***Flanagan v. Bechtel Power Corp***., 81-ERA-7 (Sec'y June 27, 1986), slip op. at 9, overruling King v. TVA, 80-ERA-1 (Sec'y May 20, 1980); ***Greenwald v. The City of North Miami Beach***, 78-SWD-2 (Sec'y Apr. 14, 1980); ***Chase v. Buncombe County, N.C.***, 85-SWD-4 (Sec'y Nov. 3, 1986); ***Egenrieder v. Metropolitan Edison/G.P.U***, 85-ERA-23 (Sec'y Apr. 20, 1987); ***Cowan v. Bechtel Construction, Inc***., 87-ERA-29 (Sec'y Aug. 9, 1989); ***The Connecticut Light & Power Co. v. Secretary of the United States Dept. of Labor***, 85 F.3d 89 (2d Cir. 1996).

[20] Waste Isolation Pilot Plant.

actionalble as whitleblower infractions.[21] If they are relevant, Complainant has not met his burden to show how they are, ***Hasan***, *supra*.

Likewise, Complainant alleges that DOE "vilified Mr. Rockefeller on the Internet, making false statements about him in a published decision of the Office of Hearings and Appeals of the Department of Energy, based on un-cross-examined untrue hearsay from Respondents. Respondents blacklisted him from employment and continue to engage in continuing violations that are part of a common scheme or plan, similar transaction or occurrence, and routine habit of Respondents." Again, with respect to the Complainant's status as a whistleblower, and how this may relate to whether this is a protected activity, this remains unexplained.[22]

Essentially, there is no dispute concerning actions that began on or about June 11, 2001 and transpired into July, 2001. A review of the Amended Complaint shows that the Complainant has pled that he has suffered new indignities and lists the following,

1. Blacklisting (Paragraph 4).
2 He was threatened (Paragraph 4).[23]
3 He has received other retaliation (Paragraph 4).
4 He worked in a hostile work environment (Paragraph 5).
5 He was the subject of an illegal trespass notice dated December 9, 1997 (Paragraph 11).
6. He was the subject of a blacklisting letter which was disseminated to the public (Paragraph 35).
7 He was prevented from obtaining evidence of wrongdoing (Paragraph 12),
8 He was issued a criminal trespass summons on June 11, 2001(Paragraph 15).
9 His picture was posted with DOE employees (Paragraph 27).
1.0 He has been falsely accused of being violent and dangerous (Paragraphs 23, 24, 25, 27,33).
11 Relevant evidence was destroyed (Paragraph 20 and 21).

The respondent admits that:

1. Complainant is a former DOE employee (Paragraph 4).

2. Complainant attempted to gain access to DOE property on June 11 (Paragraph 13).

3. In February 1999, Complainant was invited on a tour of the WIPP site in his capacity as a party to the facility's hazardous waste permit hearing, however, Complainant was carefully informed at that time that this invitation was a

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[21] See ***De Ford v. Secretary of Labor***, 700 F. 2d 281, 286 (6th Cir. 1983), ***McCafferty v. Centerior Energy***, 96-ERA-6 (ARB, October 16, 1996).

[22] He alleges that it is "based on un-cross-examined untrue hearsay". See Complainant's "Sworn Response" filed January 9, 2003.

[23] Note that in the initial complaint, the Complainant alleged that he was threatened by an unidentified agent or supporter of the Respondent. This allegation was not included in the amended complaint and will not be considered.

one-time occurrence and did not vacate or otherwise cancel the Trespass Notice.(Paragraph 14).

4. Complainant was issued a Criminal Trespass Summons by the local police on June 11, 2001 and further admits that a Criminal Trespass Summons was filed with the City of Carlsbad Municipal Court on June 12, 2001 (Paragraph 15).

Complainant attempted to gain access to certain documents under the Freedom of Information Act (FOIA) (Paragraph 20).

5. On June 14, 2001, an internal memorandum was distributed to its contractor and subcontractor managers occupying DOE property covered by the Trespass Notice and regarding Complainant's continued trespass attempts. (Exhibit 11) Respondent's June 14, 2001 internal memorandum became necessary when Complainant again attempted trespass. This internal memorandum was distributed to Managers of Contractors or Subcontractors occupying property in Carlsbad paid for by the Department of Energy and only received limited distribution on a "need-to-know" basis within those offices. (Paragraph 23).(Exhibits 12 through 19)

6. DOE conducted an event to test its Emergency Operations Center (EOC) on June 13, 2001, and that the event was reported in the local newspaper (the Carlsbad Current-Argus) and in an in-house newsletter (WIPP today) on June 14, 2001 (Paragraph 24)

7. A copy of the Trespass Notice was distributed to DOE contractors and subcontractors (Paragraph 35).

I accept that the facts as presented must be taken in Mr. Rockefeller's best light. However, a review of all of the materials submitted show that any whistleblowing activity allegedly took place when the Complainant was either still an employee of DOE or shortly thereafter. If Mr. Rockefeller was subjected to a hostile work environment, it was when he was still employed by the respondent, as he has not established that he has worked since then.

Although the Complainant asserts that he was engaged in protected activity regarding safety when he was a DOE employee, the ARB has ruled that he was not a whistleblower. The Complainant argues that collateral estoppel does not apply. "Mr. Rockefeller's first five DOL complaints were filed from May 1998 through July 1999. ... By no stretch of logic can DOE maintain that the complaint before the Court has been fully and fairly litigated in any forum: there was never a trial and the case was dismissed on procedural grounds."

A review of the affidavits attached to the January 21 Brief[24] shows that the activities that constitute the whistleblowing occurred during the period in November, 1995 and April, 1996 and to a deposition that occurred in January, 1998. The Complainant argues that his prior cases were dismissed on procedural grounds and therefore he did not have a trial, citing to ***Parklane Hosiery Co., Inc. v. Shore,*** 439 U.S. 322, 326 (1979). However, the record shows that the complete MSPB record certainly constituted a trial[25] and that issue was brought before the ARB.

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[24] Marked for identification as CX 19 and CX 20.

[25] After hearings were held, Rockefeller appealed both Initial Decisions of the administrative judge to the MSPB but then moved on June 8, 1998, to dismiss those appeals without prejudice on the asserted ground that he needed to do so in order to pursue the first of the DOL complaints at issue here. The MSPB granted Rockefeller's motion and gave him until December 15, 1998, to refile his complaint. Rockefeller v. Department of Energy, MSPB Docket Numbers DE-1221-98-0003-W-1 and DE-0752-98-0138-I-1, Order, Nov. 13, 1998. When

The ARB considered that issue and ruled otherwise.[26] Although the Complainant characterizes the requirement that the issue should have been "fully litigated", prior decisions show that the Complainant had the capacity to have brought all claims initially at the Office of Special Counsel and at the MSPB and did not do so.

In fact, the ARB reviewed the decisions to discover that there is "no hint" in the MSPB proceedings that Rockefeller ever articulated to the MSPB a CAA whistleblower claim. Rather, Rockefeller's MSPB whistleblower complaint related to his assertion that DOE officials did not follow internal DOE procedural regulations. See ARB Decision May 30, 2001. That decision is now final.[27] The Affidavits submitted constitute old wine in new bottles, as they report activities that occurred that was previously litigated, in an attempt to re-litigate the status issue. Even if the Complainant collaterally estopped, without *new* allegations of whistleblowing relating to DOE employment, the ARB evaluation of the OSC and MSPB cases is now the law of this case. Therefore, all of the proposed evidence relating to whistleblowing would relate to the period when the first five claims were pending and all of these matters have been fully adjudicated.

The Complainant also submitted the affidavit of John McCall in support, ostensibly, for his status as whistleblower. See proposed Exhibit CX -16. This document recites that during the year 2000, Mr. Rockefeller was asked to leave DOE premises due to "pending litigation". It alleges that Counsel for Respondent personally made the request. He was permitted, at that time to review some documents.

This document apparently arose from allegations made by Complainant in other cases where he has alleged harassment by employees of DOE. For example, ***Rockefeller v. State***, 130 N.M. 153, 20 P.3d 810 (N.M., 2001), *petition for rehearing denied*, ***Rockefeller v. New Mexico***, 534 U.S. 819, 122 S.Ct. 49 (Mem), 151 L.Ed.2d 20, (2001) contains similar charges against other officials.

In ***Rockefeller v. Abraham***, 23 Fed.Appx. 893, 2001 WL 1434623 (10th Cir.(N.M.)) (Not selected for publication in the Federal Reporter), *cert. den* 122 S.Ct. 1307 (Mem), 152 L.Ed.2d 217,(2002), Mr. Rockefeller brought an appeal of his MSPB case and alleged that DOE committed disability discrimination, and retaliation in violation of Title VII and under the False Claims Act. He also alleged thsat he had been retaliated against as a whitleblower, alleging, in essence, the same facts that he had alleged in the MSPB cases and in the five (5) prior DOL whistleblower cases. The United States District Court for the District of New Mexico granted

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Rockefeller failed to refile until January 25, 1999, the MSPB dismissed his appeals as untimely. Id., Opinion and Order, April 28, 1999.

[26] "Rockefeller argues that collateral estoppel more appropriately termed 'issue preclusion' does not apply to the claims raised in the first four Rockefeller cases and realleged in this case, because the initial decisions of the ALJs in those cases were not final but were only recommended decisions reviewable by the Administrative Review Board. At the time Rockefeller filed his brief his point might have been well taken, as the Board had not yet issued its decision in Rockefeller I, II, III, and IV. However, it is well settled that a judge has the discretion to dismiss 'a complaint which simply duplicates another pending related action.' ...Therefore, irrespective of the merits of Rockefeller's collateral estoppel claim, the ALJ clearly did not abuse his discretion in dismissing the repetitious claims. In any event, in the interim the ARB has issued a final decision in the four previous Rockefeller cases on October 31, 2000, dismissing them. ***Rockefeller v. U.S. Dep't of Energy***, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, appeal docketed, No.00-9545 (10th Cir. Dec. 28, 2000). Therefore Rockefeller is now also barred by the doctrine of issue preclusion from relitigating the issues raised in the previous cases." Final Decision & Order (ARB, May 30, 2001).

[27] The Complainant apparently oped not to appeal that decision.

summary judgment to DOE. As in ***Rockefeller I*** through ***V***, the complainant argued that his MSPB case should be reopened under the doctrine of equitable tolling to excuse his untimely appeal. The Complainant also amended his complaint to allege that the Department violated the Rehabilitation Act and the ADA by requesting medical information from his physicians and medical providers, which he claims the Department requested in order to harass and intimidate his physicians. The district court granted summary judgment on that issue, also. On appeal, the Court advised,

> On appeal, plaintiff argues that the district court should have excused the late filing of his complaint under a "continuing violation" theory or the doctrine of equitable tolling. Neither theory is applicable in this case. Because it is clear from the record that plaintiff was aware of the basis of his complaints at the time he filed his initial complaint with the MSPB...

Id.

The record shows that there is no mention of an employment related status when on "June 11, 2001, Mr. Rockefeller sought to research environmental issues related to Respondent's Waste Isolation Pilot Plant (WIPP)." Paragraph 13 of the Amended Complaint). The closest that Complainant comes to providing information regarrding his status as a whistleblower in these matters is:

> On June 11, 2001, Mr. Rockefeller had specifically notified Respondents' security officer, Ms. Lisa Scott, that he was a member of the Citizens for Alternatives to Radioactive Dumping ("CARD"). Mr. Rockefeller also stated to Ms. Scott that he was attempting to obtain information related to CARD's litigation concerning Respondent, and Case No. 99-0321 was noted in addition. Respondents were notified that Mr. Rockefeller "sought to research environmental issues related to Respondents' WIPP" contrary to the claim of Respondent.

Complainant's "Sworn Response" dated January 7, paragraph 13.

A review of the material from the companion cases shows that although Mr. Rockefeller has attempted to assert his status as a whistleblower, he has not been able to do so. ***Rockefeller v. Abraham***, *supra*, involved the same allegations that he had made in the MSPB case, and that have been considered to have been previously litigated. See ARB No. 00-039, ALJ No. 1999-CAA-21, Final Decision & Order (May 30, 2001). It may have been that he was retaliated against in some way, but not because he is a "whistleblower" related to his DOE employment. He may have raised environmental concerns on July 11, 2001, but he his not an "employee" as defined in the whistleblower acts.

Therefore, given the ARB finding that Mr. Rockefeller was not a "whistleblower" at any time he was employed at DOE, and he was not a "whistleblower" when he filed his five previous claims, the initial predicate – that there has been any whistleblowing activity in the first place, has not been shown. He has failed to show that any blacklisting is as a result of whistleblowing as opposed retaliation for another reason.[28] Reference to the alleged activity that occurred in June, 2001, does not demonstrate that the Respondent's conduct, even if otherwise actionable, relates to whistleblowing activity. Even if I accept that there has been retaliation against Mr. Rockefeller, to prevail he must show that is was as a result of employment related whistleblowing, and he is estopped from showing that he is a "whistleblower" when he relies on actions that occurred from 1995 to 1999 as a basis for it. The Complainant has the initial burden to prove that he engaged in a protected activity. He has failed to do so. ***Hasan v. United States Dep't of Labor***, *supra*.

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[28] Which may be actionable in another forum.

Discussion Of Certain Cases Relied by Complainant

Complainant cites to ***Delcore v. W.J. Barney Corp***., 89-ERA-38 (Sec'y Apr. 19, 1995); ***Delcore v. Northeast Utilities***, 90-ERA-37 (Sec'y Mar. 24, 1995) to show that as a former employee, he was engaged in a protected activity. These cases do stand for the proposition that a former employee can have engaged in protected activity post termination. See ***The Connecticut Light & Power Co. v. Secretary of the United States Department of Labor***, 85 F.3d 89 (2d Cir. May 31, 1996). However, a review of shows that the discriminatory behavior occurred during settlement negotiations that occurred on an ongoing basis and arose out of the employment relationship. Mr. Rockefeller last worked in December, 1997 and any whistleblowing activity that he alleges do not relate to that period or to when he filed his claims against the DOL. That is because his status has been determined by the ARB and his argument is precluded by collateral estoppel (a/k/a issue preclusion).

While it is true that blacklisting may occur as a result of a continuing violation, Complainant cites to ***Egenrieder v. Metropolitan Edison Co./G.P.U.***, 85-ERA-23 (Sec'y Apr. 20, 1987), slip op. at 8, to show that a continuing violation occurred. However, that case involved a forced resignation and subsequent blacklisting. One reason why Egenreider was forced to resign and was blacklisted was that he "'blew the whistle on the company' by giving testimony to the N.R.C. [Nuclear Regulatory Commission] and by writing non-compliance reports for not adhering to approved procedures".Id. Again, issue preclusion would apply to any activity related to the 1995-1998 period when Complainant filed his claims before DOL. This was previously litigated.

The Complainant cites to ***Stephenson v. NASA***, ARB No. 98-025, ALJ No. 1994-TSC-5 (ARB July 18, 2000), for the proposition that the Complainant should not have been banned from access to premises. However, this case stands for the proposition that I must follow the law of the case, where addressed by the ARB. There may be exceptions to this rule, but the Complainant has not provided any facts that would give rise to them.

Conclusion

To be protected under the whistleblower provision of an environmental statute, an employee's complaints must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." ***Minard v. Nerco Delamar Co.***, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1994, slip op. at 5; ***Crosby v. Hughes Aircraft Co.***, Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26, aff'd, 1995 U.S. LEXIS 9164 (9th Cir. Apr. 25, 1995). The complainant must "have a reasonable perception that [the respondent] was violating or about to violate the environmental acts." Id. The issue is one of the reasonableness of the employee's belief.

In this case, the ARB had reviewed the claim history and determined that Mr. Rockefeller was never a "whistleblower", as that term is defined by the Whistleblower Acts enforced by the Department of Labor. Although the Complainant appealed that decision to the United States Circuit Court of Appeals, he did not perfect his appeal and that ruling remains the law of this case.

Mr. Rockefeller suffered what he considers to be a violation of the environmental whistleblower acts during June and July, 2001. In order to perfect his claim, he must show that he has status as a "whistleblower".

Mr. Rockefeller was given several chances to explain how he is entitled to status as a whistleblower. He submitted materials and pleadings from other cases he has brought against the DOE. He asks me to incorporate by reference as if set forth at length briefs and arguments that he has made before other courts, including the United States Supreme Court. However, all are used in an attempt to re-litigate his status as a whistleblower stemming from the period 1995 to 1998, all of which had been previously adjudicated. He has not submitted any evidence to show

entitlement to reopening the decisions of the ARB. As an ALJ, I must follow the law of the case. ***Stephenson***, *supra*.

It is the Complainant's duty to present a *prima facia* case. ***Hasan***, supra. If the Complainant fails to establish one crucial element, as gatekeeper, I must recommend dismissal. The Complainant has not established his status as a whistleblower.

Findings

After a review of the record and after considering the arguments of the parties, I find the following

1. There are no disputed facts as to the alleged protected activity, and Tod N. Rockefeller's status as a "whistleblower" under the Clean Air Act, the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Energy Reorganization Act;
2. Mr. Rockefeller was adjudicated that he was not a "whistleblower" in five (5) separate proceedings before the Secretary;
3 Mr. Rockefeller was given the opportunity to have this issue "fully litigated" in prior proceedings, including hearings before the Merit Selection Protection Board;
4. The adjudications were appealed to the Tenth Circuit Court of Appeals, were dismissed and are final;
5. The determination regarding Mr. Rockefeller's alleged whistleblowing status was a critical and necessary part of the decision in the prior proceedings;
6. The prior forums provided Mr. Rockefeller a full and fair opportunity to litigate his status as a whistleblower;
7. Mr. Rockefeller failed to plead or offer proof that he is entitled to whistleblower status related to former employment at the Department of Enegry;
8. Mr. Rockefeller failed to establish that he was engaged in a "protected activity" as that term is defined by the whistleblower acts;
9. Mr. Rockefeller has failed to make a *prima facia* showing that he will prevail in his claim.

RECOMMENDED ORDER

IT IS RECOMMENDED that the above-captioned matter be **DISMISSED.** The hearing in this case is **CANCELLED**.

A

Daniel F. Solomon
Administrative Law Judge

NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. § 24.8 (2001).

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